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NO. 65036-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SEATTLE SCHOOL DISTRICT NO. 1, IN KING COUNTY, STATE OF WASHINGTON, BOARD OF DIRECTORS OF SEATTLE SCHOOL DISTRICT NO. 1, and MARIA GOODLOE-JOHNSON, Superintendent and Secretary of the Board,

Appellants,

v.

DA-ZANNE PORTER, MARTHA MCCLAREN, and CLIFFORD MASS,

Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION

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I. INTRODUCTION

As former school board member and United States Supreme Court Justice Lewis F. Powell observed, it is "fair to say that no single agency of government at any level is closer to the people whom it serves than the typical school board." *Bd. of Educ. v. Pico,* 457 U.S. 853, 894, 102 S. Ct. 2799, 2822 (1982) (Powell, J., dissenting).

The State of Washington has 295 school districts, each governed by a locally elected board of directors. Month to month, boards make quasi-legislative decisions setting the policy direction of the school districts under their direction. Often, they are called upon to enact policy within a highly politically charged environment. The case before this Court concerns the appropriate degree of deference properly accorded boards when setting school district policy.

The trial court misapplied well-established principles of administrative law when it found insufficient evidence and an inadequate explanation for why the Seattle School District selected Key Curriculum Press' *Discovering* Series ("*Discovering*") for high school mathematics and remanded the textbook selection to the school board for further review.

The Seattle School Board acted in accordance with the curriculum selection process enacted by the Legislature, and in doing so exercised due

consideration of the facts before it. Therefore, it acted neither arbitrarily nor capriciously when it selected *Discovering*.

However, the Washington State School Directors' Association ("WSSDA") is concerned with the decision's broader implications. The judicial determination that one pedagogical approach is inappropriate improperly narrows the District's curriculum options, undermines the curriculum selection process enacted by the Legislature, and has the undesirable effect of leaving every school district in the State in a position of uncertainty as to what curriculum selection process may be upheld by the judicial system.

Therefore, WSSDA joins with the Appellants, Seattle School District, its Board of Directors, and Superintendent Dr. Maria Goodloe-Johnson ("District"), in asking this Court to reverse the trial court and to affirm the decision made by the school board.

II. IDENTITY AND INTEREST OF AMICUS

The Washington State School Directors' Association is a statewide association that represents all 1,477 school board members from Washington's 295 local school districts. Its core mission since being founded in 1922 has been to provide programs and services to ensure that local school board members have the knowledge, tools, and resources they need to effectively lead their districts and ensure the provision of

education in public schools throughout the state. Since 1947, WSSDA has been authorized by the State Legislature to be a self-governed state agency, managed by a president and a board of directors elected by school board members from across the state. RCW 28A.345. WSSDA has always made a priority of defending school boards' right to determine local educational policy to the full extent allowed by law.

This case concerns core local policymaking by locally elected directors. Unless and until the State enacts legislation establishing mandatory statewide educational curricula, the discretion of local boards to prescribe pedagogical strategies and adopt curricula particularly suited to their local populations must be preserved and defended. WSSDA is concerned on behalf of its constituent members that the trial court gave insufficient deference (1) to the policy set forth in statute giving local boards discretion over curriculum selection; (2) to the procedural safeguards for curriculum selection set forth in statute; and (3) to the appropriate standard of judicial review of a local quasi-legislative decision.

The decision is likely to have a chilling effect on local boards across the State at a time when school districts face unprecedented challenges and require the latitude to make bold and innovative decisions.

III. ARGUMENT

Amicus WSSDA adopts the District's Statement of the Case in the Brief of Appellants and Statement of Facts from the Reply Brief of Appellants.[1] Taken as a whole and in context, these facts demonstrate that the Seattle School Board acted neither arbitrarily nor capriciously in approving *Discovering.* On the contrary, Seattle's board acted in accordance with the provisions set out by the Legislature in RCW 28A.320.230 and made a considered judgment. This Court should defer to the curriculum selection process and the board's decision.

The trial court mistakenly inserted itself into the decades-old battle over the efficacy of math curricula that has come to be known as the "math wars."[2] By determining that there was insufficient evidence for any reasonable board member to approve the selection of the *Discovering* series math curriculum, the trial court threw its weight behind the competing "direct instruction" curriculum. This action effectively took the decision out of the hands of the school board because it suggests that

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[1] Br. of Appellants at 4–7 in the Statement of the Case provides an overview of the process for adopting new textbooks, including establishing the Instructional Materials and Textbook Adoption Committees. It then provides a summary of the reasons why the District undertook to adopt a new curriculum, the development of the Textbook Adoption Committee's selection criteria along with its evaluation and eventual recommendation. Finally, the section examines the approval of the textbooks by the Instructional Materials Committee and the School Board. The Statement of Facts in the Appellants' Reply adds crucial context at pp. 1–16.

[2] The Respondents provide a good contrast of the "integrated math" versus "direct instruction" methods in their Resp't's Br. at 2–4. Appellant's Reply at 5–8 provides additional national context for the math debate.

only a direct instruction curriculum could withstand judicial review. The trial court's involvement in curricular matters injects unneeded uncertainty into deliberations of school board members statewide concerning both the curriculum and other policy matters.

A. For Sound Policy Reasons, Local Curriculum Selection Has Been Entrusted to Local School Boards Acting in a Quasi-Legislative Capacity.

The Legislature delegated to school district boards of directors broad discretionary power to establish policies that provide for the development and implementation of programs, activities, services, or practices that promote the education of students and the safe management and operation of school districts. RCW 28A.320.015. Within this scope the school boards' policymaking discretion is circumscribed only by the constitution and the necessity of avoiding conflict with other state laws. *Id.*

School boards must make myriad difficult policy decisions affecting the education of students and operation of their districts. In addition to curriculum selection, these might include decisions about extra-curricular and sports activities for students, use of school property, whether and where to build additional schools, how to define school service and catchment areas, what type of electives to offer, adding local graduation requirements and many budget related decisions. The default

structural remedy for dissenting members of the community who prefer a different policy choice is through the ballot box.

Yet, every decision made by each of the 295 school boards in the State of Washington is subject to the judicial review provision in RCW 28A.645. Consequently, judicial review of the quasi-legislative policy decisions made by school boards is subject to a highly deferential standard as further explained in the succeeding section.

Curriculum selection goes to the heart of a board's duty to determine local educational policy. The Legislature made a considered choice to place curriculum decisions in the hands of persons elected from the local community. RCW 28A.320.230. Further, the Legislature enacted express procedural safeguards that ensure an instructional materials committee provides initial review and recommendations of potential curricula before forwarding recommendations to the board. *Id.* The committee is made up of local educational professionals and parents from the community. *Id.* This statutory framework reflects a strong legislative preference for local consideration and policymaking concerning school curriculum.

The Legislature expressly preserved local boards' ultimate policymaking authority as part of a state-level review process. Attendant to a state revision of mathematics standards, the Legislature prescribed a

curriculum review process by the Superintendent of Public Instruction and the State Board of Education. RCW 28A.305.215(7).[3] Ultimately, the Superintendent adopted recommendations to school districts, accompanied by a message that "successful mathematics programs may exist with virtually any of the reviewed curricula" it had evaluated (including *Discovering*). *See* Transcript of Evidence ("TE") 1057-65; 1086. The Superintendent's message supports the Legislature's judgment that notwithstanding the outcome of the state-level review, the ultimate decision belongs to the individual school board. RCW 28A.305.215(9). In summary, the state curriculum review provisions simply reinforce the primary importance placed on local decision-making in this area.

The instant case illustrates why courts ought to tread lightly in reviewing quasi-legislative curriculum decisions. The court gets drawn into a policy debate that experts in the academic field of mathematics cannot even agree on. The Respondents devote a large portion of their brief to convincing this Court that the "direct instruction" method of teaching mathematics is objectively superior to the "inquiry-based"

[3] The state-level curriculum review is discussed in both the Resp'ts' Brief at 27–31 and the Appellants' Reply at 2–4. Combined, the facts recited amply demonstrate the continued existence of genuine academic debate by the experts as to the relative efficacies of the competing mathematics pedagogical methods.

method. Resp't Br. pp. 2-6, 12-16.[4] Yet, the record shows Seattle School Board members were faced with conflicting information in the face of a very difficult, highly politicized decision that was bound to upset one faction or another in the so called "math wars."

Faced with this difficult choice, the Board considered the relative merits of each type of curriculum and selected a series recommended by its Adoption Committee consistent with the procedural safeguards set up by the Legislature. It was a quintessentially local legislative-type decision that should not be set aside absent a showing that it was arbitrary and capricious, a standard that the challengers do not meet.

The trial court's decision raises the specter of board members making decisions based on fear of litigation rather than voting to select the curriculum they think best suits the needs of their local constituents after considering the groundwork and professional judgment of their curriculum review committees.

Moreover, the trial court's decision has the improper effect of giving that court's imprimatur to "explicit-instruction" texts at the expense of other methods. The logical extension of the trial court's finding of fact that *Discovering* employs an "inquiry-based" pedagogy and that no reasonable board member could have voted to approve those materials

[4] The Washington State School Directors Association takes no position on the relative merits of the two approaches to math curricula.

raises the question of whether boards across the State are legally free to select any curriculum that may be categorized as "inquiry-based."

B. The Standard of Review is Deferential to Legislative Decisions By Local School Boards.

"This Court will not micromanage education . . . ." *Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005). Generally, the courts grant agencies substantial deference for decisions made within the scope of agency expertise. *See Hillis v. Dep't of Ecology,* 131 Wn.2d 373, 396, 932 P.2d 139 (1997). Curriculum and learning objective reviews are "by practical necessity, largely discretionary . . . " and "[c]ourts and judges are normally not in a position to substitute their judgment for that of school authorities, . . . nor are [they] equipped to oversee and monitor day-to-day operations of a school system." *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 537, 762 P.2d 356 (1988).

Although RCW 28A.645 provides for judicial review of school board decisions, review of school board legislative or quasi-legislative acts is limited to determining whether the board acted in an arbitrary and capricious manner or contrary to law. *Yaw v. Walla Walla Sch. Dist. No. 140*, 106 Wn.2d 408, 722 P.2d 803 (1986).[5]

[5] *See also Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 495 P.2d 657 (1972) (The courts have a broader role to play in reviewing administrative acts which are of a judicial nature than where the act in question is of a legislative character.).

Agency action is arbitrary and capricious only if it is willful and unreasoning in disregard of facts and circumstances. *Wash. Indep. Tel. Ass'n v. Wash. Utils. Indus.& Transp. Comm'n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003). Where there is room for two opinions, action taken after due consideration is not arbitrary or capricious even though a reviewing court may believe the conclusion was erroneous. *Id.* As the court explained in *Pierce Cy. Sheriff v. Civil Serv. Comm'n,* 98 Wn.2d 690, 695, 658 P.2d 648 (1983), the arbitrary and capricious standard of review is a very narrow standard and the party asserting it "must carry a heavy burden."

Under this test, a court will not set aside a discretionary decision of an agency absent a clear showing of abuse. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n,* 125 Wn.2d 805, 812, 888 P.2d 728 (1995). To be overturned, a discretionary decision must be manifestly unreasonable. *ITT Rayonier, Inc. v. Dalman*, 67 Wn. App. 504, 651, 837 P.2d 647 (1992), *aff'd*, 122 Wn.2d 801, 863 P.2d 64 (1993). This abuse of discretion standard has also been defined as discretion exercised on untenable grounds or for untenable reasons. *Id.*

Washington courts have historically recognized that policy judgments by school boards are entitled to great deference. The following

quote from a 1928 case over judicial review of a school board's decision to site a new school could well apply to the instant controversy:

> In a nutshell, this whole controversy arises over a question of judgment. The petitioners before the board, the appellants here, are not in agreement with the members of the board. That disagreement of itself is not for the courts. The law has plainly vested the board of directors of school districts such as this with discretionary powers in such matters, and, the directors having examined into, and passed upon, the matter in the exercise of their discretion, the courts have no right or power to review the conclusions reached by them as a board, in the absence of a showing of abuse of discretion on their part, which is not the case here.

State ex rel. Lukens v. Spokane Sch. Dist. 81, 147 Wash. 467, 474, 266 P. 189, 191 (1928).

The record shows that the Seattle School District Board duly considered a broad scope of information, both pro and con, concerning each of the math curriculum options before it. Where the curriculum committee procedures were followed, where the board of directors duly considered all the information, and where the board exercised its best judgment, the resulting decision cannot be arbitrary and capricious, even if the court believes it made the "wrong" decision.

The decision to implement one form of curriculum or another is precisely the type of difficult decision elected board members are supposed to make. Here, a majority of the elected board members opted

for the *Discovering* Series. That decision may be rejected by the electorate or revisited by the board at another time, but the courts should accord it the deference that the Legislature intended.

IV. CONCLUSION

The Seattle School Board carefully considered curricular options, listened to the public, and voted. It was a divided vote, but the standard set forth by the Legislature is not that they reach unanimity or a consensus, only that they reach their conclusion in a deliberative manner. It fulfilled a process where a committee selects texts, the public is given reasonable opportunity for input, after which the committee makes a recommendation and the school board accepts or rejects it.

The trial court's decision improperly narrows the Seattle School District's curriculum options, substitutes its judgment for that of the local governing body, undermines the curriculum selection process enacted by the Legislature, and unnecessarily interferes with the long-established principle of local control of schools.

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Therefore, WSSDA joins with the Appellants in asking this Court to reverse the trial court and to affirm the curriculum decision of the school district Board of Directors.

RESPECTFULLY SUBMITTED this 3 day of December, 2010.

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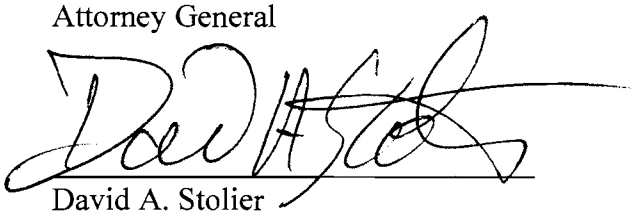

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